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Separation of Powers in New Mexico: Item Vetoes, State Policy-Making, and the Role of State Courts

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SEPARATION OF POWERS IN NEW MEXICO: ITEM VETOES, STATE POLICY-MAKING, AND THE ROLE OF STATE COURTS

Michael B. Browde[†]

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I. INTRODUCTION

While Minnesota was confronting a budget impasse in 2017, culminating with the Minnesota Supreme Court's decision in *Ninetieth Minnesota State Senate v. Dayton*,¹ New Mexico was experiencing a similar struggle over an item veto of appropriations for the state legislature and public higher education institutions. Legislative staffs in both states were well aware of each other's efforts and have since shared their experiences. Those joint collaborations may have led the Mitchell Hamline Law Review to seek a New Mexico perspective as part of Issue 2 of Volume 45, which considers separation of powers doctrine topics. The author was pleased to accept the invitation, leading to the submission of this introspective look at the New Mexico experience.

Part II of this article provides a brief summary of the separation of powers doctrine from its origins to its application in federal and state constitutional law. The focus throughout is on the inevitable tension which arises when applying a doctrine of separateness that all agree cannot, and should not, be rigorously applied. Part III then turns to the item veto provision (often referred to as the line-item veto) that allows a governor to veto particular appropriations or parts of bills appropriating money without having to veto the entire bill. Part IV follows with a review of constitutional struggles between the executive and the legislature over defining the state's role in cooperative federalism programs, or programs initiated under federal law.

With respect to the item veto power, New Mexico proves a useful window because of its extensive jurisprudence on the subject. Part III starts with New Mexico's early judicial review of the power, followed by the development of what appears to be a jurisprudence of settled principles. That jurisprudence becomes more difficult to apply when the political clash between the branches heighten and the cases become more intractable for the parties to litigate and the court to resolve.

The federal-law-based cases dealt with in Part IV brings us back to basic separation-of-powers principles: the struggle between the executive and the legislature for an upper hand at fashioning state participation in a joint federal-state program or a state program responding to federal law.

1. 903 N.W.2d 609, 618 (Minn. 2017). See also Kathleen Gearin, *The "Law of Ramsey County" - Reflections of a Trial Judge on State Government Gridlock*, 45 MITCHELL HAMLINE L. REV. 502 (2019) (discussing Minnesota's experience with legislative-executive branch disputes resulting in litigation implicating separation of powers and justiciability questions).

Part V draws conclusions about lessons to be learned from the New Mexico experience.

II. CONSTITUTIONAL SEPARATION OF POWERS IN THE SEVERAL STATES

The modern doctrine of separation of powers is rooted in the writings of early political theorists. Separating governmental powers was championed by the likes of Locke,² Blackstone,³ and Montesquieu,⁴ whose writings were well known in colonial America to those tasked with formulating new governments after breaking away from British control. Perhaps Madison, writing in the *Federalist Papers*, best described the purpose of the doctrine by liberally quoting from Montesquieu:

“When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.” Again: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.”⁵

Mindful of the British king’s corrupting power, the Framers of the Federal Constitution sought to protect against the concentration of power in any single institution by dividing authority among the three branches of the federal government—the legislative,⁶ the executive,⁷ and the judicial.⁸ This practice was already in vogue as the early states created constitutions

2. See JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (Thomas Hollis ed., 1689).

3. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (9th ed. 1690).

4. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., 1752).

5. THE FEDERALIST NO. 47, at 338 (James Madison) (Benjamin F. Wright ed., 1972) (emphasis omitted).

6. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

7. See *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

8. See *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

in the decade following the Declaration of Independence.⁹ The doctrine of separation of powers was implicit in the constitutional grant of separate and distinct powers to the individual branches, as in the federal constitution.¹⁰ Furthermore, state constitutions supported the division with the addition of an express statement of separation of powers. Such a statement was contained in the very early Virginia Constitution of 1776¹¹ and can now be found as a matter of course in many later state constitutions.¹²

Whether implicit or express, there is nothing rigidly absolutist in the American doctrine of separation of powers. Inevitably, when the courts are called upon to resolve separation of powers claims, they all recognize that the doctrine “allows some overlap in the exercise of governmental function.”¹³ They also recognize it requires a “common sense approach” under which “the absolute separation of governmental functions is neither desirable or realistic.”¹⁴ Many of the early cases take a formalistic approach

9. JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 111 (2018) (“Three states had adopted written constitutions even before Congress declared independence from England, because they found themselves otherwise without a government . . . Eleven of the thirteen states devised constitutions in 1776 or 1777.”).

10. The U.S. Supreme Court has made it abundantly clear that “[f]rom this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.” *Myers v. United States*, 272 U.S. 52, 116 (1926).

11. The structural portion of the first Virginia constitution begins:

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provisions may be made for judicial review of any finding, order, or judgment of such administrative agencies.

VA. CONST. art. III, § 1.

12. *See, e.g.*, N.M. CONST. art. III, § 1, which is markedly similar to the same expression in the early Virginia Constitution:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

13. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 32, 120 N.M. 562, 573, 904 P.2d 11, 22 (quoting *Mowrer v. Rusk*, 1980-NMSC-113, ¶ 25, 95 N.M. 48, 53, 618 P.2d 886, 891) (internal quotation marks omitted).

14. *Clark*, 1995-NMSC-048 at ¶ 32, 120 N.M. at 573, 904 P.2d at 22.

to the problem by deciding primarily whether the function involved is more legislative, executive, or judicial.¹⁵ More recent federal and state cases, however, take a more functional approach, focusing on the essential purposes served by the doctrine.¹⁶ This includes seeking to protect against undue “aggrandizement” of power by one branch over another, or “encroachment” by one branch on the essential functions of another.¹⁷

State and federal courts often find themselves well-cautioned by Justice Jackson’s most famous dictum:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.¹⁸

The constitutional doctrine of separation of powers¹⁹ permeates many areas of federal²⁰ and state²¹ law and is often perceived as unnecessarily

15. See Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) (“A formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial. It assumes that all exercises of power must fall into one of these categories and takes no ostensible account of the practicalities of administration in arriving at this determination.”).

16. See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231 (1991). Unlike formalism, functionalism resolves such issues “not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers.” *Id.* (footnote omitted).

17. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (“[T]he ‘practical consequences’ of locating the [Sentencing] Commission within the Judicial Branch pose[s] no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts.”). It has been suggested that California’s “core powers,” or “core functions” approach [to separation of powers] amounts to a middle ground. See David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U. S.F. L. REV. 655, 669 (2011) (“California courts have combined the elements of the formalist and functionalist models The core powers analysis is derived in part from relevant provisions of the California Constitution and partly by borrowing concepts from federal law, and the analysis has gradually evolved over the years to take a middle path between form and function.”).

18. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

19. It has been suggested that the doctrine is not limited to the constitutional context. See, e.g., Sharon B. Jacobs, *The Statutory Separation of Powers* 1 (July 14, 2018) (unpublished manuscript) (on file with the University of Colorado Law School).

interfering with the efficient running of government.²² But as Justice Brandeis sagely observed, suggesting the value of inter-branch friction:

The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.²³

Legal Studies Research Paper Series), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229255 [https://perma.cc/ZPT3-AMT8] (arguing that “Congress constructs statutory schemes of separation, checks, and balances through its delegations to administrative agencies,” and that “[l]ike its constitutional counterpart, the ‘statutory separation of powers’ seeks to prevent the dominance of factions and ensure policy stability.”).

20. In the pre-New Deal era, the federal courts struggled with the application of the doctrine to presidential and congressional power over appointment and removal from federal offices. *See, e.g., Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935) (upholding law limiting Presidential authority to remove a Federal Trade Commissioner except for causes listed in the statute); *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding Tenure of Office Act of 1867 invalid in so far as it attempted to prevent the president from removing executive officers).

More recently the doctrine has been used to resolve a variety of knotty problems under federal law. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding the Sarbanes-Oxley Act’s dual for-cause limitations on removal of members of the Board contravened the Constitution’s separation of powers doctrine); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (explaining that Comptroller General’s authority under “reporting provisions” of the Balanced Budget and Emergency Deficit Control Act violated the Constitution’s command that Congress play no direct role in the execution of the laws); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954–59 (1983) (striking down a congressional one-house veto of an administrative regulation).

21. State courts have also struggled with similar, diverse difficulties. *See, e.g., State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 55 (explaining that provisions of a statute that required the Attorney General to reclassify sex offenders who were already classified by judges violated the separation-of-powers doctrine); *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 25, 125 N.M. 343, 961 P.2d 768 (holding that the overhaul of New Mexico public assistance through executive action implemented a type of substantive policy change that was reserved to legislature and thus violated the separation of powers doctrine); *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1345 (Miss. 1983) (holding unconstitutional on separation of powers grounds seven boards and commissions containing legislative appointments).

22. One experienced practitioner in the field suggested that “much of the frustration and popular discontent with our governmental system is rooted in the perception that in modern society a system of separated powers makes it increasingly difficult to develop and carry out soundly conceived, coherent and effective public policy.” 38 GERALD A. McDONOUGH, MASS. PRACTICE SERIES, ADMIN. LAW & PRACTICE § 2:1, at n.36 (2d ed. 2018).

23. *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting).

Put less delicately by Professor Schlesinger, the framers may have been content to establish “permanent guerrilla warfare” among the branches and leave resolution of the problems to the future.²⁴ However, former Attorney General Edward Levi noted that the framers “did not envision a government in which each branch seeks out confrontation; they hoped the system of checks and balances would achieve a harmony of purposes differently fulfilled.”²⁵ Attorney General Levi also warned that:

Longing for simple, straight answers about the allocation of powers among the branches . . . , some assume that the courts can provide the answers . . . and can properly act as umpire between the other branches But . . . continuing judicial supervision . . . would significantly alter the balance between the courts and the other branches . . . [and thereby] weaken rather than strengthen accountability . . . [because] the Constitution, while it establishes a rule of law, was not intended to create a government by litigation.²⁶

This article, viewed through the lens of New Mexico’s experience, is focused primarily on two related areas where the “friction” is often palpable: the exercise of gubernatorial item veto authority,²⁷ and the struggles between executive and legislative actors over the setting of state policy.²⁸ Many of these judicial struggles occur in conjunction with, or as a result of, political clashes that arise when the governorship and legislative control are in the hands of opposing parties, which necessarily drags the court into a political fight. In this context, the courts are always mindful of their own doctrines of self-restraint, lest they be improperly drawn into the kind of interference that Attorney General Levi warned against.²⁹ Levi also noted the importance of self-restraint in the political branches, stating that “[i]nstitutional self-restraint does not mean that we must have a government of hesitancy. It does mean that the duty to act is coupled with a duty to act with care and comity and with a sense of the higher values we all cherish.”³⁰ Our task, then, is to explore whether, or to what extent, the political branches “act with care and comity”³¹ when clashes of separation

24. Arthur Schlesinger, *First Lecture, in CONGRESS AND THE PRESIDENCY: THEIR ROLES IN MODERN TIMES* 3 (Arthur Schlesinger & Alfred De Grazia eds., 1967).

25. Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976).

26. *Id.* at 386–87.

27. *See infra* Part II.

28. *See infra* Part III.

29. *See* Levi, *supra* note 25, at 386–87, 391.

30. *Id.* at 391.

31. *Id.*

of powers arise, and the scope of the proper role of the courts when faced with the task of resolution.

III. ITEM VETO AND THE NEW MEXICO EXPERIENCE

A. Background

The item veto is the power granted to governors to check legislative spending by eliminating items in appropriation bills without vetoing the entire bill.³² It became a popular state constitutional idea in the late nineteenth and early twentieth centuries as state constitution-makers were confronting the perceived need to impose greater control of legislative excesses, including budgetary excesses.³³ The idea of item veto garnered great support from those early periods onward. Today, more than forty state constitutions include such provisions alongside the traditional gubernatorial veto authority,³⁴ although the specific language and effect may differ from state to state.³⁵

32. No such executive power exists in the Federal Constitution, but Congress sought to create presidential item veto authority by enacting of the Line Item Veto Act in 1996. See 2 U.S.C. §§ 691–692, Pub. L. No. 104-130 (1996) (omitted 2005). After President Clinton exercised authority under that Act to cancel three provisions of law, the Supreme Court struck it down in *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998). The Court held that the Act violated the Presentment Clause of Article I, Section 7 because it would have authorized the President to create a law, the text of which was not voted on by either House or presented to the President for signature. *Id.*

33. For a brief explanation of the historic origins of the item veto authority, and whether it has served its initial purpose or created a political battleground between warring legislative and executive powers, see Stephen Masciocchi, Comment, *The Item Veto Power in Washington*, 64 WASH. L. REV. 891, 892–93 (1989). Given its historic purpose of checking legislative budgetary excesses, it is not surprising that the first American use of the line-item veto device is found in the Provisional Constitution of the Confederacy at the outbreak of the Civil War. *Id.* at 892.

34. Many veto authority provisions which contain the item veto are found in the legislative article of the relevant state constitution. This fosters the view that “when the Governor exercises his right of partial veto he is exercising a quasi-legislative function.” State *ex rel.* Dickson v. Saiz, 1957-NMSC-010, ¶ 21, 62 N.M. 227, 236, 308 P.2d 205, 211 (N.M. 1957). Even states that place the veto authority provision in the executive article, however, recognize that “[t]he placement of this *limited legislative capability* in the executive is an exception to the separation of powers,” and therefore, “the language conferring it must be strictly construed.” Colo. Gen. Assembly v. Lamm, 704 P.2d 1371, 1383 (Colo. 1985) (citing Strong v. People *ex rel.* Curran, 220 P. 999, 1002–03 (Colo. 1923) (emphasis added)).

35. See Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175–76 (1993):

The Colorado Supreme Court has explained the item veto's importance in the context of modern state legislation, where all bills (other than general appropriation bills), must encompass a single subject,³⁶ thereby preventing "abuses such as log rolling . . . , riders . . . , and omnibus appropriation bills."³⁷ The item veto prevents similar abuses with respect to the general appropriation bill and helps to assure a balanced budget without requiring all-or-nothing choices by the governor in considering the general appropriation bill.³⁸

The New Mexico item veto provision, the focus of this article, was first proposed in an earlier constitutional iteration. Prior to statehood, the item veto provision was located in the Executive Article, and it provided gubernatorial power to disapprove a single part, or parts, of any bill appropriating money.³⁹ The current New Mexico item veto provision is located in the Legislative Article of the state constitution, which was adopted in 1911. It provides that "[t]he governor may . . . approve or disapprove any part or parts, item or items, of any bill appropriating money, and . . . such [parts or items] disapproved shall be void unless passed over his veto."⁴⁰ New Mexico is among the states with broad item

Forty-three states provide for the item veto, including every state admitted to the Union since the Civil War and every state but one west of the Mississippi. In forty-two of those states, the item veto is limited to bills making appropriations At least ten states allow governors to reduce as well as disapprove items. Many states permit governors to veto general legislation that the legislature has incorporated in an appropriations bill, although other states limit the item veto to monetary items.

For a more current listing of those differences, showing the operative language in the constitutions of the states that provide for item vetoes, see the Table of State Item Veto Provisions, *infra* Appendix A [<https://perma.cc/NN7K-UM9K>].

36. See, e.g., N.M. CONST. art. IV, § 16 ("[N]o bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws . . .").

37. *Lamm*, 704 P.2d at 1383 (citations omitted).

38. *Id.*; see also *Karcher v. Kean*, 479 A.2d 403, 416 (N.J. 1984) ("The constitutional line-item veto power serves the governmental need to have a balanced budget in place at the start of the fiscal year. . . . It reflects a realistic appreciation of the fiscal and operational exigencies that attend the striking of the state's budget."); Opinion of the Justices to the House of Representatives, 428 N.E.2d 117, 120 (Mass. 1981) ("[I]f through the appropriation process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the careful balance of powers struck in [the state constitution] would be destroyed, and the fundamental principle of separation of powers . . . would be substantially undermined.").

39. See N.M. CONST. of 1889, art. V, § 7.

40. N.M. CONST. art. IV, § 22. The constitutional convention of 1910, which adopted the current constitution, considered a different item veto provision which may

veto provisions, given that it “increased the partial veto power to parts of bills of general legislation which contained incidental items of appropriation.”⁴¹ It also allows veto of non-monetary provisions and appropriation bills beyond a general annual appropriations act.⁴²

*B. The Initial Interpretive Rulings of the New Mexico Supreme Court*⁴³

In earlier cases, the New Mexico Supreme Court found the application of the item veto provision fairly easy to resolve. In addition to making clear that the proviso applies beyond general appropriation bills to “any bill appropriating money,”⁴⁴ the early opinions established that the item veto is a power that may not be exercised with respect to non-appropriation bills.⁴⁵ The early New Mexico decisions also established that the state constitution allows appropriation bills to describe how amounts appropriated are to be expended.⁴⁶ Furthermore, the constitutional language extends beyond “item or items” of appropriation to include “part

have limited the partial veto to “items of appropriation,” but it was rejected in favor of the current version. *See State ex rel. Dickson v. Saiz*, 1957-NMSC-010, ¶ 18, 62 N.M. 227, 235, 308 P.2d 205, 210.

41. *Saiz*, 1957-NMSC-010 at ¶ 18, 62 N.M. at 235, 308 P.2d at 210 (quoting Brief of Amici Curiae, Irwin S. Moise and Lewis R. Sutin).

42. *Id.* The New Mexico General Appropriation Act (“GAA”) for the next fiscal year is introduced in the House of Representatives early in each session and contains the specific appropriations for most of the general operation of state government, listing the items and amounts of appropriation by sources of the funds. An example of the opening pages of a recent GAA including the page showing the appropriation for the Legislative Branch, (chosen only because it is short) is contained in Appendix B, *see infra* Appendix B [<https://perma.cc/A95M-E7CF>].

43. Most of the relevant appellate rulings in New Mexico are from the New Mexico Supreme Court because such cases are generally brought as mandamus actions under the court’s original jurisdiction. *See* N.M. CONST. art. VI, § 3. The New Mexico high court has legitimated that practice as “a proper vehicle by which to test the constitutionality of vetoes or attempted vetoes by the Governor.” *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 6, 86 N.M. 359, 363, 524 P.2d 975, 979. The New Mexico practice is consistent with that of many other jurisdictions. *See State ex rel. Cason v. Bond*, 495 S.W.2d 385 (Mo. 1973); *Commonwealth v. Dodson*, 11 S.E.2d 120 (1940); *Fulmore v. Lane*, 140 S.W. 405 (1911).

44. *Saiz*, 1983-NMSC-010, ¶ 14, 62 N.M. at 233, 308 P.2d at 209.

45. *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 6, 100 N.M. 342, 670 P.2d 953 (“[B]ecause the Act does not appropriate money, we hold that the Governor’s veto power was invalidly exercised in violation of Article IV, Section 22.”) (citations omitted).

46. *State ex rel. Holmes v. State Bd. of Fin.*, 1961-NMSC-172, ¶ 18, 69 N.M. 430, 436, 367 P.2d 925, 929–30. Indeed, the New Mexico Constitution requires that “[e]very law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.” N.M. CONST. art. IV, § 30 (emphasis added).

or parts” of such bills, thereby allowing for a partial veto of such non-financial provisions.⁴⁷ A series of later opinions, including cases that dealt with item vetoes of provisions in the General Appropriation Act (discussed in a later subsection), as well as the cases discussed in the subsection that follows, deserve more careful attention.

C. New Mexico’s Modern Item Veto Cases and Enhanced Judicial Involvement

1. The Sego and Coll Opinions.

*State ex rel. Sego v. Kirkpatrick*⁴⁸ ushered in a more nuanced and complicated analysis with respect to the governor’s veto authority. Specifically, *Sego v. Kirkpatrick* recognized that the governor has a broader authority to veto parts beyond the mere item of appropriation.⁴⁹ Critically, however, the *Sego* court also recognized that the broad gubernatorial authority to veto parts beyond items of appropriation “does not mean there are no limitations on the partial veto of bills appropriating money.”⁵⁰ The *Sego* court declared that such a limitation necessarily derived from the principle of “checks and balances” underlying our system of government:

The power of veto, like all powers constitutionally conferred upon a governmental officer or agency, is not absolute and may not be exercised without any restraint or limitation whatsoever. The very concept of such absolute and unrestrained power is inconsistent with the concept of “checks and balances,” which is basic to the form and structure of State government created by the people of New Mexico in their constitution, and is inconsistent with the fundamental principle that under our system of government no man is completely above the law.⁵¹

47. See *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶17, 86 N.M. 359, 365, 524 P.2d 974, 981:

[T]he purpose or purposes for the inclusion of the terms “part or parts,” “item or items” and “parts or items” in our Constitution were to extend or enlarge the partial veto power thereby conferred beyond the partial veto power conferred by the constitutions of other states wherein that power is limited to (1) items of appropriation, and (2) to general appropriation bills.

48. 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975.

49. *Id.* ¶¶ 16–17, 86 N.M. at 364–65, 524 P.2d at 980–81.

50. *Id.* ¶ 17, 86 N.M. at 365, 524 P.2d at 981.

51. *Id.* ¶ 5, 86 N.M. at 362, 524 P.2d at 978 (citing *Jenkins v. Knight*, 293 P.2d 6 (Cal. 1956)).

Against this backdrop, the *Sego* court articulated two principles that should govern the evaluation of separation-of-powers challenges to the exercise of the gubernatorial item veto. The first principle established that the gubernatorial item veto should not be exercised in such a way as to create legislation:

The power of partial veto is . . . a negative power . . . , and is not a positive power Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature⁵²

The second principle established that:

The Legislature may not properly abridge [the item veto] power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the Governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation.⁵³

The court expanded upon the second *Sego* principle in *State ex rel. Coll v. Carruthers*,⁵⁴ with particular reference to item vetoes in general appropriation acts. The court explained that a separation of powers line is crossed when the legislature attaches conditions to general appropriation bills that reserves to itself “powers of close supervision that are essentially executive in character.”⁵⁵ While the legislature may impose restrictions on appropriated funds, such restrictions must be limited to matters of “significant financial impact,” as distinguished from “detailed, miniscule, inconsequential executive management decisions.”⁵⁶ Thus, the legislature may impose “a condition precedent to the expenditure of appropriated funds,” as distinguished from a provision that deals with “the details of managing the expenditure once approval is granted.”⁵⁷

52. *Id.* ¶ 18, 86 N.M. at 365, 524 P.2d at 981.

53. *Id.* ¶ 12, 86 N.M. at 364, 524 P.2d at 980. For an interesting extension of legislative drafting that would be a gross violation of this *Sego* principle, see Nicholas Passarello, Note, *The Item Veto and the Threat of Appropriations Bundling in Alaska*, 30 ALASKA L. REV. 125, 125 (2013) (dealing with a draft of an appropriation bill, later withdrawn, that would have included a line in its appropriation bill that if any single appropriation were line-item vetoed the entire bill would be void).

54. 1988-NMSC-057, ¶ 7, 107 N.M. 439, 442, 759 P.2d 1380, 1383.

55. *Id.* ¶ 12, 107 N.M. at 443, 759 P.2d at 1384 (quoting *Anderson v. Lamm*, 579 P.2d 620, 624 (1978)).

56. *Id.* ¶ 11, 107 N.M. at 443, 759 P.2d at 1384.

57. *Id.* ¶ 18, 107 N.M. at 444, 759 P.2d at 1385. The *Coll* court also admonished the legislature that conditions on appropriations which attempt to “enact [a] policy” are “not suitable for inclusion in the general appropriation bill” because that bill “shall embrace

Most importantly, the *Coll* court made two other principles clear. First, cases of this nature involve a delicate constitutional balance, and therefore the court must strive to “leave intact the basic legislative oversight and appropriation function while assuring the executive a reasonable degree of freedom and discretion over the expenditure of appropriated funds.”⁵⁸ Second, judicial evaluation of such challenges requires that “our subjective evaluation of the facts underlies the principles and tests we espouse and rely upon.”⁵⁹

Thus, *Sego* established the basic principles guiding judicial review of item vetoes in New Mexico: the governor has a role to play in the legislative process through his item veto authority. This role is limited and “negative” in nature. Therefore, the court must oversee both the improper aggrandizement of gubernatorial power and improper legislative drafting attempts that encroach upon the proper exercise of gubernatorial executive-management powers.⁶⁰ *Coll* expanded on these principles by adding a more specific guideline for separation-of-powers inquiries when a challenge involves the item veto of legislative language in relation to a particular appropriation in an appropriations act.⁶¹

Such formulations may be difficult for the court to apply, in light of the *Coll* court’s assertion that *improperly* imposed legislative conditions are separate “items” for purposes of the item veto power, and therefore, a veto of those items does not require the money to which the condition is attached also to be stricken.⁶² This latter assertion gives rise to the negative implication—that a *properly* imposed legislative condition may not be stricken unless the appropriation conditioned also is stricken.⁶³ This is perhaps out of fear that it might otherwise create new positive legislation in violation of the *Sego* principle that the item veto power is only a negative “power to disapprove.”⁶⁴

In any event, the obligation of a careful and detailed judicial review stems from the court’s view of its traditional role at the core of the

nothing but appropriation,” and such matters are “better addressed by general legislation.” *Id.* ¶ 13, 107 N.M. at 443, 759 P.2d at 1384 (citing N.M. CONST. art. IV, § 16; State *ex rel.* Delgado v. Sargent, 1913-NMSC-054, ¶ 14, 18 N.M. 131, 134 P. 218, 219).

58. *Id.* ¶ 24, 107 N.M. at 446, 759 P.2d at 1387.

59. *Id.* ¶ 12, 107 N.M. at 443, 759 P.2d at 1384.

60. State *ex rel.* Sego v. Kirkpatrick, 1974-NMSC-059, ¶¶ 17–18, 86 N.M. 359, 365, 524 P.2d 975, 981.

61. *Coll*, 1988-NMSC-057 at ¶¶ 24, 12, 107 N.M. at 443, 446, 759 P.2d at 1387, 1384.

62. *Id.* ¶ 22, 107 N.M. at 445, 759 P.2d at 1386.

63. *Id.*

64. See *Sego*, 1974-NMSC-059, ¶ 18, 86 N.M. at 365, 524 P.2d at 981.

constitutional order to oversee the balance of powers between the executive and the legislature.⁶⁵ That task must be performed even though, as required here, the court must engage in a “subjective evaluation of the facts” underlying the principles being applied.⁶⁶ In applying the principles of *Sego* and *Coll*, the court binds itself to a highly functional approach to the resolution of item veto challenges. Such difficulties are no different from those encountered by the U.S. Supreme Court in applying a functional approach to difficult separation-of-powers principles at the federal level.⁶⁷

Given the special nature of the governor’s item veto power under state constitutions, a reviewing court taking the New Mexico approach may not be able to resort to the formalistic analysis employed by the federal courts. Under this analysis, federal courts often deem a particular function as essentially “executive,” “legislative,” or “judicial,” and then merely allow the labeling to determine the result.⁶⁸ With respect to the exercise of the item veto power, however, governors exercise a kind of constitutionally authorized, albeit limited, legislative authority.⁶⁹ Thus, the easy resort to

65. See *State ex rel. Los Ranchos v. City of Albuquerque*, 1994-NMSC-126, ¶ 15, 119 N.M. 150, 156, 889 P.2d 185, 191 (“The reviewability of executive and legislative acts is implicit and inherent in the common law and in the division of powers between the three branches of government.”); see also *Marbury v. Madison*, 5 U.S. 137, 177–79 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is.”).

66. *Coll*, 1988-NMSC-057 at ¶ 12, 107 N.M. at 443, 759 P.2d at 1384.

67. See *Mistretta v. United States*, 488 U.S. 361, 397 (1989) (finding that although the service of Article III judges on the Federal Sentencing Commission was “somewhat troublesome,” the Court was able to uphold that practice against a separation of powers challenge). The *Mistretta* Court also noted that “[t]he ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch,” and stated that “we cannot see how the service of federal judges on the Commission will have a constitutionally significant practical effect on the operation of the Judicial Branch.” *Id.* at 404, 406.

Similarly, in *Morrison v. Olson*, the Court was confronted with the difficult question of whether the appointment system for the independent counsel, who was authorized to investigate and prosecute high-ranking government officials under the Ethics in Government Act of 1978 (since expired), violated separation of powers by circumscribing Presidential supervision and removal authority. 487 U.S. 654 (1988). Taking a pragmatic approach, the Court upheld the law, concluding that the President’s “need to control” the Independent Counsel was not “so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.” *Id.* at 691–92.

68. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (“[B]ecause Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers.”).

69. See *State ex rel. Dickson v. Saiz*, 1957-NMSC-010, ¶ 21, 62 N.M. 227, 236, 308 P.2d 205, 211 (“[W]hen the Governor exercises his right of partial veto he is exercising a

formalism is not an option in item veto cases because both the governor and the legislature are acting in a legislative capacity. Rather, the court must apply its best judgment to determine whether—through the exercise of that power—the governor “arrogate[s] unto himself the power of making appropriations,” or whether the legislature “abridges” its constitutional authority by subtly drafting “conditions, limitations or restrictions upon appropriations.”⁷⁰

To say that the boundaries between the two are less than clear is to state the obvious. The lack of clarity regarding what the court might conclude in its “subjective evaluation of the facts” in any given challenge to a gubernatorial item veto after a *Sego/Coll* review could result in two different, but perhaps equally salutary, results.

On one level, ambiguity could serve an important instrumental value. If the political branches were to take a page from the federal framers, they would understand that “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against [inter-branch] encroachments.”⁷¹ Rather, it is through the “interior structure of the government . . . that its several constituent parts may, *by their mutual relations*, be the means of keeping each other in their proper places.”⁷² Or, put more succinctly by two modern constitutional scholars contemplating similar federal constitutional ambiguities, “[t]hese conflict-producing ambiguities may themselves have contributed to furthering the Framers’ purposes of combating excessive concentrations of power.”⁷³ It might therefore be hoped that uncertainty of judicial resolution will lead the warring factions to find ways to avoid this confrontation, which would require courts to denominate one side the winner and the other the loser—a result which ill serves the political system and limits the number of item veto cases which might otherwise be brought.

On another level, the principles established by the New Mexico Supreme Court in the *Sego/Coll* decisions (which essentially establish

quasi-legislative function.”) (citing *Spokane Grain & Fuel Co. v. Lyttaker*, 109 P. 316 (Wash. 1910)).

70. *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 12, 86 N.M. 359, 364, 524 P.2d 975, 980 (N.M. 1974).

71. THE FEDERALIST NO. 48 at 347 (James Madison) (Benjamin F. Wright ed., 1972).

72. THE FEDERALIST NO. 51 at 355 (James Madison) (Benjamin F. Wright ed., 1982) (emphasis added).

73. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 343 (15th ed. 2001).

instructions to both branches) might provide sufficient guidance to the parties and lessen the need for litigation over these disputes.⁷⁴

Due to politics, however—and especially in an era of such divided government—neither suggestion seems to have had an effect. Rather, the item veto battles have continued in New Mexico, as we see in the cases that follow. This requires the courts to either resolve such cases or find useful means of restraint that may, on occasion, also lead to resolution.

2. *The Post-Sego/Coll Cases*

In *State ex rel. Smith v. Martinez*,⁷⁵ the New Mexico Supreme Court faced an attempt by the governor to reduce an item of appropriation. The governor, relying on the assertion in *Coll* that “New Mexico . . . allows the broadest possible veto authority by additionally providing authority to veto ‘parts,’ not only ‘items,’”⁷⁶ argued that striking the “1” from the \$150,000 appropriation for the benefit of the mortgage finance authority was consistent with that principle. She asserted that *Coll* conferred the power “to veto something smaller and more discrete than ‘items,’” and that “[o]ne hundred thousand is a ‘part’ of \$150,000.00.”⁷⁷ The court rejected this argument, however, holding that “[t]he Governor’s partial veto that would allow scaling of appropriations is invalid and unconstitutional” and violates the separation of powers doctrine.⁷⁸

The *Smith* court began its analysis by noting that existing “partial veto decisions do not answer the question raised in this case,” but that “principles about the line-item veto” found in other cases could assist in finding a resolution.⁷⁹ The court first turned to *Coll*, which recognized the limit to the item veto power: the “power of partial veto is only a negative power to disapprove; it is not the power to enact or create new legislation

74. *Sego*, 1974-NMSC-059 at ¶ 12, 86 N.M. at 364, 524 P.2d at 980 (including the instruction that the legislature must not abridge the item veto power by “subtle drafting of conditions, limitations or restrictions upon appropriations,” and the correlative instruction that the governor must refrain from distorting “legislative appropriations or arrogat[ing] unto himself [or herself] the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation.”). *Id.*

75. 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276.

76. *Id.* ¶ 5, 150 N.M. at 703, 265 P.3d at 1277 (citing *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 8, 107 N.M. 439, 442, 759 P.2d 1380, 1383).

77. *Id.* ¶ 5, 150 N.M. at 703, 265 P.3d at 1277 (alteration in original).

78. *Id.* ¶ 10, 150 N.M. at 703, 265 P.3d at 1278. As is sometimes done in original matters deemed to require expedited relief, the court in this case ruled from the bench after oral argument, with a later issued Opinion “to further explain the order of [the] Court.” *Id.* ¶ 2, 150 N.M. at 703, 265 P.3d at 1276–77.

79. *Id.* ¶ 6, 150 N.M. at 703, 265 P.3d at 1277.

by selective deletions.”⁸⁰ The court then coupled this limitation with *Sego*’s requirement “that [the veto] eliminate[s] or destroy[s] the whole of an item or part” and prohibits “the striking of individual words that results in legislation inconsistent with the Legislature’s intent.”⁸¹ On these grounds, the court ruled that the striking of the single numeric digit “did not eliminate the whole of the item,” but instead “distorted the Legislature’s intent to appropriate \$150,000.”⁸² The court thereby added the following definitive principle to the item veto consideration: “[t]here is no authority to scale back: the governor may strike the whole of the appropriation or leave it intact; she may not conceive her own appropriation.”⁸³

Shortly after *Smith* was decided, the court confronted a different problem resulting from a 2011 bill that amended five sections of the Unemployment Compensation Law in *State ex rel. Stewart v. Martinez*.⁸⁴ The bill sought to address impending insolvency in the unemployment compensation fund by reducing benefits to the unemployed and increasing employer contributions beyond the contribution amount paid in 2011.⁸⁵ The governor exercised a partial veto and struck one of the variables in a section of the bill that was necessary to calculate employer contributions beginning in January 2012.⁸⁶ The heart of the problem was described by the court as follows:

[T]he Governor’s veto, perhaps inadvertently, left a void, as there is no Contribution Schedule for 2012. Without a Contribution Schedule in 2012, there is no basis with which to determine employer contributions to the unemployment fund by established employers for calendar year 2012. These employers have effectively been exempted from what has been a mandatory contribution requirement since the Act’s inception.⁸⁷

80. *Id.* ¶ 8, 150 N.M. at 703, 265 P.3d at 1278 (quoting *Coll*, 1988-NMSC-057 at ¶ 6, 107 N.M. at 442, 759 P.2d at 1383) (emphasis added).

81. *Id.* (quoting *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 18, 86 N.M. 359, 365, 524 P.2d 975, 981) (emphasis in original).

82. *Id.* ¶ 8, 150 N.M. at 703, 265 P.3d at 1278.

83. *Id.*

84. 2011-NMSC-045, ¶ 1, 270 P.3d 96, 97. The *Stewart* court initially refused to rule on the merits because a special session of the legislature had been called, and the Governor expressed her intent to include this statutory dispute on the agenda of that session. *Id.* ¶ 8, 270 P.3d at 99.

85. *Id.* ¶ 1, 270 P.3d at 97.

86. *Id.*

87. *Id.* ¶ 7, 270 P.3d at 99 (citations omitted).

Once again, the court returned to the principles articulated in *Sego* and *Coll* to conclude that the partial item veto was invalid. The court began with the dual policing role it accepted in *Sego*: (1) to protect the governor against legislative abridgement of the item veto power “by subtle drafting of conditions, limitations or restrictions upon appropriations;” and (2) to shield the legislature from an exercise of the item veto to “create legislation inconsistent with that enacted by the legislature, by the careful striking of words, phrases, clauses or sentences.”⁸⁸ The court made it clear that the issue in this case presented the latter problem of “whether the Governor’s partial veto of House Bill 59 destroyed the whole of the item or part, leaving a workable piece of legislation without creating legislation that is inconsistent with the Act.”⁸⁹

In deciding that question, the *Stewart* court turned to *State ex rel. Dickson v. Saiz*⁹⁰ for the proposition that “[a]ll language that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid. In addition, the remaining legislation must continue to be a

88. *Id.* ¶ 11, 270 P.3d at 100 (quoting *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 12, 86 N.M. 359, 364, 524 P.2d 975, 980).

89. *Id.* ¶ 11, 270 P.3d at 100. The court acknowledged that the case also raised a serious question whether the bill is one “appropriate[ing] money,” a constitutional prerequisite for the application of the item veto. Finding the issue involving “the whole of an item or part” to be both “dispositive and perhaps less complex,” the court noted that “for the purposes of this Opinion, we assume, without deciding that . . . [the bill] is a bill appropriating funds.” *Id.* ¶ 12, 270 P.3d at 100.

Though the court in *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 6, 100 N.M. 342 344, 670 P.2d 953, 955, found it easy to resolve the “bill appropriating money” question, the *Stewart* court correctly noted that is not often the case. 2011-NMSC-045 at ¶ 12, 270 P.3d at 100. For example, in a very complex bill dealing with a number of statutory changes involving public safety passed by the New Mexico Legislature during the 2018 regular session, the governor used the line item veto to eliminate substantive portions of the bill, even though there was no direct appropriation in the act. *See* H.B. 19, 53d Leg., 2d Sess. (N.M. 2018); N.M. OFFICE OF GOVERNOR, H. EXEC. MESSAGE NO. 148 (Mar. 7, 2018). At best, there may have been some reference in the bill to either past or future appropriations, yet the governor claimed she was acting under Art. IV, § 22. The bill and the Executive Message can be found at www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=19&year=18 [https://perma.cc/TV9X-3D3S]. Other courts have made clear that transfers of previously appropriated money may be subject to the item-veto authority of the governor. *See, e.g.,* *Wielechowski v. State*, 403 P.3d 1141, 1153 (Alaska 2017); *Rios v. Symington*, 833 P.2d 20, 25-30 (Ariz. 1992). On the other hand, it has been held that bills authorizing the issuing of bonds are creations of debt and are not appropriations subject to the line-item veto power. *Fordice v. Bryan*, 651 So. 2d 998, 1000-01 (Miss. 1995).

90. 1957-NMSC-010, ¶ 28-32, 62 N.M. 227, 237-238, 308 P.2d 205, 211-212 (per curiam separate opinion denying motion for rehearing) (upholding the governor’s use of a partial veto when all sections related to that purpose were vetoed).

workable piece of legislation.”⁹¹ In *Stewart*, then, it was clear to the court that:

The Governor’s veto eliminate[d] established employers’ contributions for 2012 by making it impossible to determine the 2012 employer contribution rate. By only deleting certain language, the setting of the 2012 Contribution Schedule to Schedule 3, and leaving other phrases relating to the same subject matter intact, . . . the Governor’s veto impermissibly left an incomplete and unworkable Act.⁹²

The court therefore concluded that “the partial veto to House Bill 59 is constitutionally invalid.”⁹³ The *Stewart* court also explained that the item veto could have been constitutionally applied by “completely delet[ing] all the provisions in House Bill 59 that would have addressed the concerns described in the Governor’s veto message,”⁹⁴ but because the item veto did not do so, it was invalid. Thus, the lessons from *Smith* and *Stewart* are clear—when the governor’s objection is to a “part” or “item,” it is the whole part or item that must go, as well as any other part or item so related to the offensive part which, if left standing, would lead to an “incomplete and unworkable Act.”

That leaves open the question of whether two similar items of appropriation in a single general appropriation act require the veto of both to accomplish an appropriate item veto. The court considered this issue in *State ex rel. Cisneros v. Martinez*⁹⁵ when confronted with two separate judicial pay increases in the same act:

The first increase, funded in Section 4(B) of the Appropriations Act, was a 5% raise, the appropriation for which was lumped in with various other appropriations to the judicial branch to pay the salaries of all judicial employees, including judges. . . .⁹⁶

The second increase, separately funded in Section 8(A) of the Appropriations Act, was the same 3% raise authorized for all eligible state employees, including judges. Section 8(A)(2) in particular allocated \$579,937 to fund the 3% raise for judges and increased the salary of a Supreme Court Justice to \$134,922, a sum that included both the 5% and the 3% raises.⁹⁷

91. *Stewart*, 2011-NMSC-045 at ¶ 15, 270 P.3d at 101.

92. *Id.* ¶ 22, 270 P.3d at 103.

93. *Id.* ¶ 24, 270 P.3d at 103.

94. *Id.* ¶ 21, 270 P.3d at 103.

95. 2015-NMSC-001, 340 P.3d 597.

96. *Id.* ¶ 1, 340 P.3d at 598 (citation omitted).

97. *Id.* ¶ 2, 340 P.3d at 598 (citation omitted).

The governor exercised the line-item veto authority to strike the language of section 8(A)(2), cancelling the application of the three percent raise, but did not touch the language of section 4(B) dealing with the five percent raise.⁹⁸ The petitioners, including lower court judges and their associations,⁹⁹ challenged the veto of the three percent raise, thereby seeking the full eight percent pay raise or, in the alternative, at least preserving the five percent raise.¹⁰⁰ The governor sought to maintain the veto of the three percent raise and also claimed that since the veto of section 8(A)(2) included the lump sum salary figure for supreme court justices (\$134,922) which encompassed “the total sum of both appropriations,” the veto of the three percent raise effectuated the removal of the entire eight percent raise.¹⁰¹

The court, in a *per curiam* opinion, held “the Governor’s veto was effective with respect to the 3% raise set forth in Section 8(A)(2).”¹⁰² The court, however, also ruled that the five percent raise separately funded in section 4(B) of the Appropriations Act was never vetoed and therefore survived intact.¹⁰³ In so doing, the court struggled over whether, or to what extent, it was bound by, or was abandoning its earlier declarations relating to the necessity that connected vetoes stand or fall together.

The *Cisneros* court’s analysis began with the re-articulation of two settled principles from prior cases—that the item veto is “not a positive power” but only a “negative power, or a power to delete or destroy;”¹⁰⁴ and that it must “destroy[] the whole of an item or part [without] distort[ing] the legislative intent.”¹⁰⁵ The court then made an unexpected

98. *See id.* ¶ 3, 340 P.3d at 598–99.

99. The bill also affected sitting supreme court members, four of whom recused themselves. *Id.* ¶ 5, 340 P.3d at 599. However, under the so-called “rule of necessity,” the remaining sitting Justice, Richard Bosson, (who did not recuse, but was not standing for retention in the coming election) was appointed Chief, with the power to preside and appoint a quartet of retired jurists to sit *pro tempore* to decide the case. *Id.*

100. *Id.* ¶ 4, 340 P.3d at 599.

101. *Id.* ¶ 24, 340 P.3d at 604. “The Governor took the position that regardless of what the Legislature’s original intent may have been to make two separate appropriations, that intention changed or evolved as the Appropriations Act took final form.” *Id.*

102. *Id.* ¶ 6, 340 P.3d at 599.

103. *Id.* This was another case in which the court ruled from the bench, with this later opinion setting forth its “reasoning in more detail.” *Id.*; *see, e.g.*, *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 3, 107 N.M. 439, 759 P.3d 1380, 1383.

104. 2015-NMSC-001 at ¶ 23, 340 P.2d at 603 (citing *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 18, 86 N.M. 359, 365, 524 P.2d 975, 981).

105. 2015-NMSC-001 at ¶ 23, 340 P.2d at 603 (citing *Sego*, 1974-NMSC-059 at ¶ 18, 86 N.M. at 365, 524 P.2d at 981; *State ex rel. Smith v. Martinez*, 2011-NMSC-043, ¶ 8, 150 N.M. 703, 265 P.3d 1276, 1278) (alterations in original).

shift from its traditional item veto analysis, contending that “[t]hese broad principles provide only *the starting point of our analysis* [because] each situation has come down to *the particular facts of a particular appropriation* and a particular veto.”¹⁰⁶ The opinion mis-cites the *Sego* decision for this proposition,¹⁰⁷ which says nothing about the “fact-bound” nature of the inquiry or its importance. The *Coll* decision does, but only in reference to the need for the court to engage in a “subjective evaluation of the facts” in striking the balance between legislative and executive authority through the application of the *Sego/Coll* principles.¹⁰⁸

Nonetheless, this refocus allowed the *Cisneros* per curiam to construct its search for legislative intent with respect to judicial salaries as a “factual” matter—whether the legislature intended a combined eight percent raise or two separate raises of three percent and five percent.¹⁰⁹ Finding some ambiguity on that question in the words of the statute, the court relied on the “structure of the statute.”¹¹⁰ Namely, the court noted “the Legislature’s own choice to fund these raises through two separate appropriations, contained in two separate sections of the Appropriations Act, and made to two separate branches of government—5% to the Judiciary and 3% to [Department of Finance and Administration].”¹¹¹ Once that “factual” issue was resolved, it was easy for the court to conclude that “the Legislature intended two separate raises . . . one of which the Governor vetoed, the other of which remained intact.”¹¹²

The court found that “the Legislature intended the money allocated in Section 8(A)(2) to fund the same 3% raise for judges that was given to other state employees in Section 8(A) . . . [and] . . . the Governor’s veto removed from the Appropriations Act every trace of the 3% raise for judges.”¹¹³ This led inexorably to the conclusion that “[e]verything related to the 3% raise for judges was confined to Section 8(A)(2), which the Governor vetoed in its entirety.”¹¹⁴

The court recognized, however, that the “closer question is whether the veto of Section 8(A)(2) had any effect on the 5% raise funded in

106. *Id.* ¶ 23, 340 P.2d at 603 (emphasis added).

107. *Sego*, 1974-NMSC-059 at ¶ 11, 86 N.M. at 365, 524 P.2d at 981.

108. *Coll*, 1988-NMSC-057, ¶ 12, 107 N.M. at 443, 759 P.2d at 1384.

109. *Cisneros*, 2015-NMSC-001 at ¶ 23–26, 340 P.3d at 603–04.

110. *Id.* ¶ 25, 340 P.3d at 604 (citing *State v. Almanzar*, 2014-NMSC-001, ¶ 15, 316 P.3d 183, 186).

111. *Id.*

112. *Id.*

113. *Id.* ¶ 27, 340 P.3d at 604.

114. *Id.*

Section 4(B).¹¹⁵ This is especially clear given the governor's argument that "the money appropriated in Section 4(B) to fund the 5% raise cannot be used for its intended purpose because her veto eliminated all of the 'language' in the Appropriations Act related to a judicial salary increase."¹¹⁶ The governor cited language in *Stewart* to suggest that her argument met the requirement.¹¹⁷ The court rejected the governor's argument, however, claiming it "overlooks the distinct facts of this case," whereby section 4(B) "gave judges a 5% raise through [an] appropriation[] . . . without any 'pay raise language' to veto but the appropriations themselves."¹¹⁸ The court concluded that "the general rule articulated in *Stewart* that '[a]ll language that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid' simply does not apply."¹¹⁹

The court was then confronted with the governor's further argument that "if the veto of Section 8(A)(2) did not also eliminate the 5% raise in Section 4(B), the entire appropriation in Section 4(B) 'is improper and should be stricken' due to 'careful drafting of legislation' aimed at 'circumvent[ing] or preempt[ing] the Governor's veto power,'" as established in *Sego*.¹²⁰ This time, rather than suggesting that the specific facts overrode the *Sego* dictum, the court contended it was not until *Coll* that the court was confronted with applying the *Sego* limitation on legislative drafting.¹²¹ This remains the only instance in which the court has "rejected a challenge to a partial veto based . . . on a refusal to validate 'artful drafting' by the Legislature."¹²²

Rather than making any factual distinction from the application in *Coll*, the court determined the "Legislature imposed no condition . . . upon its appropriations for judicial pay raises" in its two "stand-alone, unconditional, and separate appropriations [that] must be vetoed in their entirety like any other appropriation of which the Governor disapproves in whole or in part."¹²³ The court, therefore, rejected the governor's invitation "to interpret the notion of 'subtle drafting' to fit the circumstances of this case" because to do so would not provide any "limiting principle to

115. *Id.* ¶ 28, 340 P.3d at 604.

116. *Id.* ¶ 354, 340 P.3d at 606.

117. *Id.* ¶ 34-35, 340 P.3d at 606.

118. *Id.* ¶ 35, 340 P.3d at 606.

119. *Id.* (citing *State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶ 15, 270 P.3d 96, 101).

120. *Id.* ¶ 37, 340 P.3d at 607 (alterations in original); see *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 12, 86 N.M. 359, 365, 524 P.2d 975, 981.

121. *Cisneros*, 2015-NMSC-001 at ¶ 38, 340 P.3d at 607.

122. *Id.*

123. *Id.* ¶ 39, 340 P.3d at 607.

distinguish subtle drafting from drafting that is not so subtle.”¹²⁴ The court clarified that “[o]utside of the facts of *Coll* . . . we . . . prefer to allow the legislative process to play out free from judicial interference.”¹²⁵ The court thereby expressed a kind of deference to the political process not previously found in the item veto cases, and undermined the *Coll* decision in the process.

Understanding that it had done some violence to the important principles of *Sego* and *Coll*, the court concluded with a veiled *mea culpa*,¹²⁶ suggesting it could not “find any legal basis to conclude” the existence of legislative overreach, particularly “when the Governor had notice of the Legislature’s intent and *when she had other tools in the political process at her disposal*.”¹²⁷ Besides, the court continued, this case had arisen in an “unusual context . . . unlike any of our precedents.”¹²⁸

Thus, the post-*Sego/Coll* cases provided useful application of the previously established principles that governed item veto litigation, until *Cisneros* and its *per curiam* effort to resolve the dispute over dual judicial raises in the 2014 General Appropriation Act. In upholding one of the raises and allowing the item veto of the other, the New Mexico Supreme Court came to a reasonable compromise. However, it did so in a way that may allow future cases to avoid application of the *Sego/Coll* principles when confronted with an “unusual circumstance” or where it can be suggested that the governor has “other tools in the political process at [his or] her disposal.

D. The Inevitable Invitation for Judicial Restraint

Despite the steady stream of item veto cases in New Mexico, especially during recent periods of politically-divided government,¹²⁹ the New Mexico Supreme Court also has recognized that judicial activism in

124. *Id.* ¶ 42, 340 P.3d at 608 (citing *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53, 75).

125. *Id.*

126. *See id.* ¶ 46, 340 P.3d at 609.

127. *Id.* (emphasis added.) The court detailed numerous opportunities, outside the resolution of item-veto disputes, for the governor and legislature to work together in the formulation of legislation—opportunities that *always* exist and could be used in future cases to prevent judicial challenges. *Id.* ¶¶ 12–18, 340 P.3d at 601–02.

128. *Id.* ¶ 47, 340 P.3d at 609.

129. It should not be surprising that during the same period of divided government, redistricting efforts requiring a new statute with gubernatorial consent could not be resolved without judicial involvement. *See, e.g., Maestas v. Hall*, 2012-NMSC-006, ¶ 45, 274 P.3d 66, 81 (court-drawn redistricting remanded for the second time to correct, among other things, “the partisan performance changes and bias noted in this order . . .”).

this area is not always necessary—or the best policy. Even when the issues may appear critically important, judicial declination to proceed may arise when other possible paths to resolution present themselves. Given that most item veto cases are brought as original mandamus actions in the New Mexico Supreme Court,¹³⁰ the court may easily fall back on the principle to refuse to hear a case because the petitioner failed to demonstrate an absence of a “plain, speedy and adequate remedy.”¹³¹

One recent example can be found in *State ex. rel. Stewart v. Martínez*,¹³² when the court initially refused to hear the case because the governor intended to include the issue for consideration in a previously called special session, noting:

Because the special session took place before the effective date of the language vetoed by Governor Martinez, addressing the issue during the special session would have been a plain, speedy, and adequate remedy in the ordinary course of law that was available to Petitioners; therefore, a writ of mandamus was not warranted.¹³³

“When no resolution was reached on the issue during the 2011 Special Session” and “[p]etitioners asserted that their petition was ripe,” the New Mexico Supreme Court then took the case back for resolution on the merits.¹³⁴

Even more critical, however, was a case brought in 2017 that evidenced just how pitched the battle between the executive and the legislature may become. In *State ex rel. the Legislative Council v. Martínez*,¹³⁵ there was a challenge to a broad exercise of the line-item veto of the General Appropriation Act of 2017. First, the governor exercised the item veto authority to strike all items dealing with the funding of the state legislature, stating the following justification:

Throughout this legislative session, and others, I have heard a great deal of discussion about how the Legislative and Judicial

130. See N.M. STAT. ANN. § 44-2-3 (1978) (exclusive original mandamus jurisdiction in the district and supreme courts); see also *supra* text accompanying note 43.

131. See N.M. STAT. ANN. § 44-2-5 (1978) (“The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law.”).

132. 2011-NMSC-045, 270 P.3d 96, discussed previously at *supra* text accompanying note 84.

133. *Id.* ¶ 8, 270 P.3d at 99 (citing *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 158, 990 P.2d 1277, 1281).

134. *Id.* ¶ 9, 270 P.3d at 100.

135. Petitioner’s Reply in Support of Petition for Emergency Writ of Mandamus, *State ex rel. The Legislative Council v. Martínez*, No. S-1-SC-326422 (N.M. May 10, 2017), <https://perma.cc/V3VV-3L9F>.

branches are separate but co-equal branches of government. While true, it apparently does not apply when they are considering reductions to their budgets. Every time the Legislature imposes across-the-board reductions, the Legislature exempts both itself and the Judiciary from the same level of reductions that most of our agencies face.¹³⁶

The governor's veto message also contended that the legislature's appropriations, like those for the district courts, are done in a "lump sum" fashion, while the executive agencies are appropriated by specific categories. She claimed this treatment of the legislature and the court does not lend itself to ensuring "accountability through the effective allocation of resources for the benefit of all New Mexicans," as the Legislative Finance Committee's mission statement states.¹³⁷ One might question whether the governor's statement in returning the bill to the House represents a fair expression of the principle of separation of powers with respect to the three equal branches of government,¹³⁸ or perhaps a failure

136. The governor's veto message does not acknowledge that the total appropriation for the legislature represents only 0.3 percent of the state annual budget or that the appropriation for the entire statewide judiciary represents only 4.5 percent of the state annual budget. *See* Verified Emergency Petition for Original Writ of Mandamus at 5, No. S-1-SC-36422 (N.M. Apr. 21, 2017), <https://perma.cc/B2G4-P7GB>.

137. N.M. OFFICE OF GOVERNOR, H. Exec. MESSAGE NO. 56, at 2 (Apr. 7, 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/ExecMessages/house/HB0002GovMsg.pdf> [<https://perma.cc/WWW8-KUBC>]. The specific comments by the governor demonstrate her equal displeasure with the way legislative budget proposals have also exempted the judiciary from across-the-board cuts, and the "lump sum" funding of district courts. Thus, it would have been obvious that any ruling in favor of the legislature in a potential law suit over this wholesale item veto implicating legislative authority might also have benefited the supreme court's own budget formulation authority for the judiciary. *Id.*

138. Judicial review of item vetoes may not extend to an evaluation of the governor's "statement of reasons." As the Colorado Court has cogently explained: "[W]e are mindful of the fact that the governor may veto a bill for any reason he chooses . . . and this court will not inquire into the governor's justifications for a veto." *Romer v. Colo. Gen. Assembly*, 840 P.2d 1081, 1084 (Colo. 1992) (citations omitted); *see also* *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 618 (Minn. 2017) ("We do not 'judge the wisdom of a veto, or the motives behind it . . .'" (citations omitted). *But see* *Cannabis Action Coal. v. City of Kent*, 322 P.3d 1246, 1253 (Wash. Ct. App. 2014), *aff'd*, 351 P.3d 151 (Wash. 2015) (treating governor's veto message that accompanied his line-item veto as legislative intent because governor is acting in legislative capacity when approving or disapproving legislation).

The *Romer* court went on to hold that where the state constitution requires that that bill be filed "with his objections," a mere statement of the governor's disapproval is not sufficient.

As the defendants acknowledged during oral argument, the statements "it's unfair," or "it's against the public interest" would undoubtedly pass

of necessary executive sensitivity to the budgetary needs of the other two branches.¹³⁹

The governor also exercised the line-item veto on the 2017 General Appropriation Act to eliminate the funding for all institutions and entities involved in higher education. This included items that spanned twenty-eight pages of the Act, with the following brief comment:

The Senate refused to hold a hearing for nominated Regents for several higher education institutions. This is a clear violation of its constitutional duty. When the Senate appropriated three quarters of a billion dollars to these institutions, it also took the unprecedented step of refusing to hold a hearing for those responsible for the oversight of the appropriated public dollars. Both the funding for our higher education institutions and the confirmation of well-qualified regents can be addressed in the upcoming special session.¹⁴⁰

The governor signed the bill on April 7, which included the item vetoes of entire budget categories for the legislature and all institutions of higher education. An Emergency Petition for Original Writ of Mandamus challenging the vetoes of the legislative line-items and the higher education line-items was filed on April 21, 2017, alleging in its “Summary of the Bases for the Writ” as follows:

The undue encroachment by one co-equal branch of government upon another, through the imposition of

constitutional scrutiny as “objections.” Unlike “disapproved” these statements convey the reasons for disapproval; the sufficiency, rationality, or validity of which we will not question. “To disallow a veto for the complete absence of reasons is to establish an objective standard—one with which meddlesome courts cannot tamper. To disallow a veto because the Governor’s reasons are not ‘sufficient’ establishes a subjective standard that invites limitless mischief.”

Romer, 840 P.2d at 1084–85 (citation omitted). The New Mexico Supreme Court recently followed this line of reasoning in affirming a district court judgment in another veto challenge by the legislature to ten bills returned to the house of origin by the governor without a statement of objections. *See* Order at 2, *State ex rel. Legislative Council v. Martinez*, No. S-1-SC-36731 (N.M. Apr. 25, 2018), <https://perma.cc/HSP2-CH8H>. The court, in its Order of affirmance, ruled: “Article IV, § 22 of the New Mexico Constitution requires that objections must accompany a returned bill . . . [and] . . . because the Governor’s objections did not accompany the returned bills at issue in this case, the bills became law three days after they were presented to the Governor for approval.” *Id.*

139. Out of respect for the co-equal branches, Hawaii’s Constitution allows for item vetoes, “[e]xcept for items appropriated to be expended by the judicial and legislative branches.” HAW. CONST. art. III, § 16.

140. N.M. OFFICE OF GOVERNOR, *supra* note 137, at 7. Although the governor mentions an “upcoming special session,” no proclamation for calling one had yet been issued. *See* N.M. CONST. art. IV, § 6.

improvident vetoes which attempt to eviscerate the ability of the other branch to perform its essential functions, violates the essence of the constitutional doctrine of separation of powers. In the present circumstances, the challenged line-item vetoes, which purported to remove all funding for the Legislative Branch, violate the doctrine of separation of powers and also are in derogation of Article IV of the New Mexico Constitution, which *obligates* the Legislature to fund the expenses of the Legislative, Executive, and Judicial Branches.

The Constitution also prohibits the wholesale defunding, through a purported line-item veto, of our constitutionally-enabled and statutorily-authorized institutions of higher education and other constitutionally-created departments, agencies, and state government institutions. As amplified below, a Writ of Mandamus is necessary and appropriate to invalidate the challenged vetoes and to restore the funding set forth in the General Appropriation Act.¹⁴¹

Thus, the petition was primarily based on the claim that the governor could not use the item veto to eliminate all funding for the co-equal branches of government or the constitutionally created institutions of higher education.

Three days later, the court requested a response, invited amicus participation from the New Mexico Council of University Presidents,¹⁴² and set the matter for oral argument on May 15, 2017.¹⁴³ On the day that the Governor's Response and the Presidents' Amicus Brief¹⁴⁴ were filed, the governor issued a proclamation calling the legislature into special

141. Verified Emergency Petition for Original Writ of Mandamus at 1-2, State *ex rel.* The New Mexico Legislative Council v. Martinez, No. S-1-SC-36422 (N.M. Apr. 21, 2017) (emphasis in original), <https://perma.cc/B2G4-P7GB>.

142. This invitation was not surprising because the Petition built an argument based on a letter from the President of the New Mexico Council of University Presidents to Governor Martinez objecting to the vetoes of funding for public colleges and universities. *See id.* at 7.

143. Order at 2, State *ex rel.* Legislative Council v. Martinez, No. S-1-SC-36422 (N.M. Apr. 24, 2017), <https://perma.cc/Y4GS-GYER>.

144. Perhaps most telling and politically powerful were the portions of the Presidents' *amicus curiae* brief making note of the particularly critical and time sensitive concerns of the colleges and universities and the entities under their control. That brief argued the following three points: The threat to public health in New Mexico; the disruption of recruitment and retention of students, faculty and medical staff; and the acute budget uncertainty that has caused other problems for higher education. *See* Brief of the N.M. Council of Univ. Presidents as Amicus Curiae at 19, State *ex rel.* the Legislative Council v. Martinez, No. S-1-SC-36422 (N.M. May 5, 2017), <https://perma.cc/2YL7-RKKF>.

session on May 24 to address the funding issues raised in the Petition.¹⁴⁵ Three days before the hearing on the Petition was to take place, the court issued an Order reciting the foregoing procedural history and ordered “that the petition for writ of mandamus is **DENIED AS NOT RIPE FOR REVIEW**.”²⁵¹⁴⁶

The legislature met on May 24 and re-passed the previous appropriations to the legislature and the colleges. The bill, named the Supplemental General Appropriation Act of 2017, was signed into law by the governor on May 26.¹⁴⁷ The bill avoided any further involvement by the court, beyond its previous orders calling for publicly filed briefs and its order stepping aside to allow for a necessary political resolution during the special session, which ultimately facilitated the resolution of the crisis.

By doing so, the court avoided what otherwise would have been a constitutional crisis of grave and enormous proportions, no matter how it might have been resolved. If the planned veto eliminating all funding for the legislature had survived, it would have prevented the legislature from conducting its important interim activities between sessions. The veto, therefore, also would have impeded the ability of the legislature to function during the next scheduled regular session by eliminating all funding for legislators and legislative staff. Such a result would prevent one of the three co-equal branches from undertaking its constitutional functions, including its important checks-and-balances review over the

145. The Governor’s proclamation lists as the first “object” for which the session was called “[a] general appropriation act that provides specific funding for legislative agencies and institutions of higher education.” See Response to Verified Petition for Original Writ of Mandamus at Ex. A, State *ex rel.* the Legislative Council v. Martinez, No. S-1-SC-36422 (N.M. May 5, 2017), <https://perma.cc/6AZM-2K82>.

146. Order at 2, State *ex rel.* Legislative Council v. Martinez, No. S-1-SC-36422 (N.M. May 11, 2017) (formatting in original), <https://perma.cc/89YQ-MV6Z>. The *Legislative Council* difficulty in New Mexico was taking place almost simultaneously with the even more complex difficulty surrounding the Minnesota item veto experience in *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609 (Minn. 2017). *Ninetieth Minn. State Senate* involved a dispute over a tax bill that the governor allowed to pass as a temporary measure, but not without his veto of the appropriations for both the House and Senate, to lure the legislative leadership back to the bargaining table. *Id.* at 614. The *Ninetieth Minn. State Senate* court concluded that “the line-item vetoes did not violate Article III by effectively abolishing the Legislature,” but exercised “restraint on the coercion aspect of the Article III issue,” out of regard for the power of the parties “to resolve political disputes that arise in the course of . . . [the legislative] process,” and because “the Legislature has access to the funding it says it needs to continue its legislative functions until it reconvenes in the next regular session.” *Id.* at 612–13. As a result, the *Ninetieth Minn. State Senate* court remanded the case to the district court for entry of dismissal. *Id.*

147. See H. B. 1, 53d Leg., Spec. Sess. (N.M. 2017).

broad ranging activities of the executive branch of government that are a part of its legislative function.¹⁴⁸

On the other hand, if the court had ordered that the wholesale elimination of the funding was unconstitutional, it would have undermined the joint budget making function of the political branches.¹⁴⁹ Courts are disinclined to conclude that the legislature can make its own demands on the treasury until such times as the political branches can agree on a budget.¹⁵⁰

The same concerns apply with respect to the wholesale veto of all higher education funding. Even though the state institutions of higher education are not “co-equal” branches of government, seven of the colleges and universities, as well as other educational and related institutions, have specific constitutional status.¹⁵¹ This status should perhaps afford them constitutional protection from the gubernatorial power to eliminate all of their funding, which would put them out of business for a

148. Prior New Mexico cases had not dealt with the extreme situation presented in *Legislative Council*, but there were suggestions in prior cases supporting this position. *See, e.g.,* Thomson v. Legislative Audit Comm’n, 1968-NMSC-184, ¶¶ 16-17, 79 N.M. 693, 697, 448 P.2d 799, 803 (stating that the legislature could not abolish the constitutionally established office of State Auditor, by taking away its fundamental functions or not properly funding the office); State *ex rel.* Prater v. State Bd. of Fin., 1955-NMSC-013, ¶ 11, 59 N.M. 121, 127-28, 279 P.2d 1042, 1046 (declaring that were the appropriations of the Barbers’ Board so reduced “as to put it out of business as effectively as if repealed,” it would violate the constraining influence of N.M. Const. art. IV, § 16 which mandates that a GAA shall embrace funding of the three branches of government). *See also* State *ex rel.* Nunez v. Baynard, 15 So. 2d 649, 659 (La. Ct. App. 1943) (holding that with respect to salaries of positions created in the constitution the legislature is bound to appropriate the funds to pay them, and the governor’s veto of these appropriations “was unconstitutional, null and void”).

149. *See Ninetieth Minn. State Senate*, 903 N.W.2d at 612-13 (exercising restraint on one aspect of the constitutional challenge to the item veto of the legislative appropriation out of regard for the power of the parties “to resolve political disputes that arise in the course of [the legislative] process”).

150. In *Ninetieth Minn. State Senate*, however, both the Governor and the legislature stipulated that courts could order temporary funding for the legislature while the issue was resolved. 903 N.W.2d at 615. *See also* State *ex rel.* Brotherton v. Blankenship, 207 S.E.2d 421, 431 (W. Va. 1973) (“We adhere to the maxim that the judiciary department possesses the inherent power to determine its needs and to obtain the funds necessary to fulfill such needs.”).

151. *See* N.M. CONST. art. XII, § 11 (establishing the constitutional basis of the following institutions: The University of New Mexico, New Mexico State University, New Mexico Highlands University, Western New Mexico University, Eastern New Mexico University, New Mexico Institute of Mining and Technology; as well as the New Mexico Military Institute, New Mexico School for the Blind and Visually Impaired, New Mexico School for the Deaf, and Northern New Mexico State School).

large part of an academic year. And, as argued in the University Presidents' Brief, even the threat that funding might cease in a few months may have catastrophic implications for each institution of higher education.¹⁵²

With regard to the institutions of higher education, the governor's position might be strengthened by the fact that, however viewed, the colleges and university are not equal branches, and in any case, they perform largely executive functions overseen by the Higher Education Department.¹⁵³ The Secretary of the Higher Education Department is a member of the governor's cabinet, and that authority coupled with the role that the governor plays in university oversight through the appointment of the board of regent, suggests a level of executive control not afforded with respect to the legislature or the courts.¹⁵⁴

The range and complexity of these arguments demonstrate that judicial restraint may, in some instances, be an appropriate choice, especially if other paths toward resolution are on the horizon. In this case, by allowing the filing of the Petition, requiring full briefing of the parties (including the university presidents), setting the case for an expeditious oral argument, and only then deciding not to hear the case on "ripeness" grounds, the court may have done everyone a favor. It thereby allowed for the political branches to honor their responsibilities and demonstrated that the power of the judiciary can sometimes be measured as much by what it does not do, as by what it does do.

IV. EXECUTIVE AND LEGISLATIVE STRUGGLES OVER SETTING STATE POLICY

The item veto tug of war between the legislature and the governor, reviewed in the prior section, was often resolved by the court's application of a highly functional approach. As noted earlier, formalism would not work well where both branches were relying on the conference of *legislative power* to each under article IV, section 22 of the state constitution.¹⁵⁵ Thus, in resolving item veto cases, the court has often based its decision on whether manipulative drafting by the legislature overstepped the line into micromanaging the execution of the law or,

152. Brief of the N.M. Council of Univ. Presidents as Amicus Curiae at 9-18, *State ex. rel. the Legislative Council v. Martinez*, No. S-1-SC-36422 (N.M. May 5, 2017).

153. See N.M. STAT. ANN. § 9-25-1 et seq. (1978).

154. N.M. STAT. ANN. § 9-25-4 (1978).

155. For earlier discussions of formalism and functionalism in this context, see *supra*, notes 15-17 and 61-62.

alternatively, whether the governor's veto improperly interfered with the legislative prerogative of fashioning state law.¹⁵⁶

Non-item veto struggles generally involve standalone actions by either the executive or the legislature.¹⁵⁷ When such claims are made in New Mexico, the courts invoke the express separation-of-powers provision in the constitution.¹⁵⁸ Those cases are more fundamentally based on the separate constitutional articles that define the powers of each, and the claim that the exercise of the power of one branch either exceeds the power granted to it, or encroaches on the constitutional power of the other branch.

We turn now to case examples to further understand how separation-of-powers operates in state constitutional law by examining two non-item veto matters that were brought as original actions in the New Mexico Supreme Court.¹⁵⁹ These cases involved issues regarding which branch had the primary responsibility to exercise state authority over Indian gaming and welfare reform.¹⁶⁰ Both cases raised federalism concerns because they also involved the exercise of state power under federal law.

A. *The Indian Gaming Dispute*

In *State ex rel. Clark v. Johnson*,¹⁶¹ the Governor of New Mexico attempted to enter into contracts with various Indian tribes to permit Indian Gaming Enterprises on tribal lands in compliance with the Federal Indian Gaming Regulatory Act (IGRA).¹⁶² IGRA does not mandate state authorization of tribal gaming, but requires authorization with respect to

156. *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 12, 86 N.M. 359, 364, 524 P.2d 975, 980 (holding that “[t]he Legislature may not properly abridge [the Governor’s veto] power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the Governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation.”).

157. See Winston David Holliday, Jr., Comment, *Tipping the Balance of Power: A Critical Survey of the Gubernatorial Line Item Veto*, 50 S.C. L. REV. 503 (1999).

158. That clause provides: “no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.” N.M. CONST. art. III, § 1.

159. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11; *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

160. *Clark*, 1995-NMSC-048, ¶¶ 1–2, 120 N.M. at 566, 904 P.2d at 15; *Taylor*, 1998-NMSC-015, ¶ 2, 125 N.M. at 346, 961 P.2d at 771.

161. 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

162. 25 U.S.C. §§ 2701–21 (1995).

general, casino-like gaming (classified by IGRA as Class III gaming).¹⁶³ Federal law provides that such gaming “is lawful on Indian lands only if such activities are located in a state that ‘permits such gaming for any purpose by any person organization or entity, and [is] conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.’”¹⁶⁴ While the outgoing governor had refused to undertake negotiations with respect to Class III gaming, Governor-elect Gary Johnson appointed a negotiator who agreed to compacts and revenue-sharing agreements with several tribes. Governor Johnson signed these compacts soon after taking office.¹⁶⁵

A petition was filed thereafter, claiming that the governor “lacked the authority to commit New Mexico to these compacts and agreements, because he attempted to exercise legislative authority contrary to the doctrine of separation of powers expressed in the state Constitution.”¹⁶⁶ In resolving the case, the New Mexico Supreme Court first reviewed its prior commitment to separation-of-powers as “fundamental in the structure of the federal government and the governments of all fifty states.”¹⁶⁷ The court noted that the doctrine “‘allows some overlap in the exercise of governmental function.’”¹⁶⁸ The court then asserted its necessary but reluctant intervention “when one branch of government unduly ‘interfere[d] with or encroach[ed] on the authority or within the province

163. The brief history leading to the adoption of IGRA, the three classes of gaming the Act deals with, and the federal-state relationship in enforcing its provisions, is briefly described in *Clark*, 1995-NMSC-048, ¶¶ 3-4, 120 N.M. at 566, 904 P.2d at 15.

164. *Id.* ¶ 4, 120 N.M. at 566, 904 P.2d at 15 (quoting 25 U.S.C.S. § 2710(d)(1)) (alteration in original).

165. *Id.* ¶ 8, 120 N.M. at 567, 904 P.2d at 16.

166. *Id.* ¶ 2, 120 N.M. at 566, 904 P.2d at 15 (citing N.M. CONST. art. III, § 1; *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992)). Before turning to the separation of powers issue, the court addressed a number of preliminary issues. Borrowing from part of the seminal *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975 decision dealing with related matters, the *Clark* court ruled that the original mandamus petition was properly brought; that a mandamus action may extend to both affirmative and prohibitory relief; that the tribes were not indispensable parties; and finally, that an expansive construction of state law seems to authorize other organizations in the state to engage in “casino-style” gaming, thereby triggering the applicability of IGRA’s directions with respect to Class III gaming, but in any event, the governor has taken a course contrary to the legislatures “expressed . . . public policy against unrestricted gaming.” *Clark*, 1995-NMSC-048 at ¶¶ 14-30, 120 N.M. at 568-72, 904 P.2d at 17-21.

167. *Id.* ¶ 31, 120 N.M. at 573, 904 P.2d at 22.

168. *Id.* ¶ 32, 120 N.M. at 573, 904 P.2d at 22 (quoting *Mowrer v. Rusk*, 1980-NMSC 113, ¶ 25, 95 N.M. 48, 54, 618 P.2d 886, 892).

of a coordinate branch of government.”¹⁶⁹ The court first articulated its task in markedly formalistic terms:

If the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor’s authority as the State’s chief executive officer. If, on the other hand, his actions in fact conflict with or infringe upon what is the essence of legislative authority—the making of law—then the Governor has exceeded his authority.¹⁷⁰

The court then concluded: “We have no doubt that the compact . . . does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law.”¹⁷¹

Not satisfied to end the matter there under its apparent formalistic approach, the court, citing *Nixon v. Administrator of General Services*,¹⁷² made clear that it would apply its test to determine “whether the Governor’s action disrupts the proper balance between the executive and legislative branches.”¹⁷³ This functional turn allowed the court to list and rely upon a number of ways in which the governor’s action worked as an “undue disruption of legislative authority.” Those included:

[a.] The Governor’s present authority could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement. The compact . . . cannot be said to be consistent with these principles [because] [t]he terms of the compact . . . give the Tribe a virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico on the date the Governor signed the agreement.¹⁷⁴

169. *Id.* ¶ 32, 120 N.M. at 573, 904 P.2d at 22 (quoting *Mowrer*, 1980-NMSC 113 at ¶ 28, 95 N.M. at 54, 618 P.2d at 892). *Mowrer* also held, *inter alia*, that “any statute, which requires that the judiciary first submit its requested budget to the mayor or any part of the executive branch of government prior to submitting the same to the legislative branch of government is unconstitutional as violative of Article III of the Constitution of New Mexico.” *Mowrer*, 1980-NMSC 113 at ¶ 6, 95 N.M. at 50–51, 618 P.2d at 888–89. It is prior holdings like *Mowrer* that bolster the suggestion that if *State ex rel. Smith v. Martinez*, 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276 had been litigated to conclusion in favor of the legislature, it might have had broad implications by limiting executive line-item authority over judicial appropriations.

170. *Clark*, 1995-NMSC-048, ¶ 33, 120 N.M. at 573, 904 P.2d at 22.

171. *Id.* ¶ 34, 120 N.M. at 573, 904 P.2d at 22.

172. 433 U.S. 425, 443 (1977).

173. *Clark*, 1995-NMSC-048, ¶ 34, 120 N.M. at 574, 904 P.2d at 23.

174. *Id.* ¶¶ 34–35, 120 N.M. at 574, 904 P.2d at 23.

[b.] While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority.¹⁷⁵

[c.] Whether or not the legislature, if given an opportunity to address the issue of the various gaming compacts, would favor a more restrictive approach consistent with its actions in the past constitutes a *legislative policy decision*. . . . By entering into such a permissive compact[,] . . . the Governor contravened the legislature's expressed aversion to commercial gambling and exceeded his authority as this State's chief executive officer.¹⁷⁶

The court faced a federal preemption-based argument made by the governor, who claimed that "even if he lacked authority under state law to enter into the compact, it is nonetheless binding upon the State . . . as a matter of federal law," and that regardless of whether he has such authority as a matter of state law, "he possesses the authority, as a matter of *federal law*. . . ." ¹⁷⁷ Both claims were summarily rejected by the court because "[t]he Governor has only such authority as is given to him by our state constitution and statutes enacted pursuant to it."¹⁷⁸ The court did not believe that Congress "sought to invest state governors with powers in excess of those that the governors possess under state law."¹⁷⁹ Finally, recognizing that the Federal Congress could enact legislation "legalizing all forms of gambling on all Indian lands," the court emphasized that rather than doing that, IGRA "sought to give the states a role in the process" by authorizing state officials, "acting *pursuant to their authority held under state law*, to enter into gaming compacts on behalf of the state."¹⁸⁰

Clark came at the end of an understandable political battle between one party, whose governor opposed the infusion of generalized casino

175. *Id.* ¶ 36, 120 N.M. at 574, 904 P.2d at 23.

176. *Id.* ¶ 37, 120 N.M. at 575, 904 P.2d at 24 (emphasis added). Having resolved the constitutional separation of powers issue, the court also rejected gubernatorial claims that the Governor's actions were authorized under two state statutes. *See id.* ¶¶ 41-43, 120 N.M. at 576-77, 904 P.2d at 25-26.

177. *Id.* ¶ 44, 120 N.M. at 577, 904 P.2d at 26 (emphasis in original). In reciting the facts of the case, the court mentioned that the Governor's compacts had been approved by the Secretary of Interior, but no federal preemption argument on that basis seems to have been made, although the Governor presented such an argument in the welfare case which is next treated in this section. *Id.* ¶ 8, 120 N.M. at 567, 904 P.2d at 16.

178. *Id.* ¶ 44, 120 N.M. at 577, 904 P.2d at 26.

179. *Id.*

180. *Id.* ¶ 45, 120 N.M. at 577, 904 P.2d at 26 (emphasis added).

gambling in the state through the IGRA process, and the opposing party, whose gubernatorial candidate endorsed such infusion and won the next election. *Clark*, however, forced the issue of Indian gaming back into the legislative arena, where the issue necessarily became not whether there would be Indian gaming, but rather in what form and under what regulatory regime.¹⁸¹ In the process, the court was able, rather easily, to conclude that the matter of compacting with the Indian tribes involved so many issues of state policy that the legislative's role must be primary.¹⁸²

B. The Welfare Litigation

The New Mexico Supreme Court seemed to speak clearly on the matter in *Clark*. Nevertheless, a similar executive and legislative struggle had to play out again regarding the extensive changes in the essential federal-state partnership to create and carry out a cornerstone program of the Social Security system dealing with the care of the needy. In *State ex rel. Taylor v. Johnson*,¹⁸³ the governor engaged in a replay of the script he tried to administer in *Clark*—exercising his executive authority to create a new welfare program in the wake of a new federal welfare statute. This time, however, the executive action came *after* the state legislature had adopted a new state statutory regime in compliance with the federal law that the governor vetoed.¹⁸⁴

As explained in *Taylor*, the Federal Aid to Families with Dependent Children program (AFDC) was adopted as part of the Social Security Act of 1935 and created “a new federal-state public assistance partnership” in which the federal government “established the primary framework for public assistance programs and offered funding for states that implemented their programs.”¹⁸⁵ New Mexico signed on in 1937 with the adoption of the Public Assistance Act (NMPAA), allowing the state to participate in the federal program and obtain significant federal funds for the benefit of its needy population.¹⁸⁶ That partnership between the federal and state governments continued over several decades with a number of adjustments and additions.¹⁸⁷ A major change, however, occurred with the passage of the Federal Personal Responsibility and Work Opportunity

181. *Id.* ¶ 42–43, 120 N.M. at 576–77, 904 P.2d at 25–26.

182. *Id.* ¶ 47, 120 N.M. at 577–78, P.2d 26–27.

183. 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

184. *Id.* ¶¶ 6–12, 125 N.M. at 346–47, 961 P.2d at 771–72.

185. *Id.* ¶ 6, 125 N.M. at 346, 961 P.2d at 771.

186. *Id.* ¶ 7, 125 N.M. at 346–47, 961 P.2d at 771–72.

187. *Id.* ¶ 8, 125 N.M. at 347, 961 P.2d at 772 (including the addition of the food stamp and medical assistance programs).

Reconciliation Act of 1996 (PRA).¹⁸⁸ The PRA repealed several constraints on the states, gave them greater flexibility, and replaced the AFDC structure with a block-grant program called Temporary Assistance to Needy Families (TANF). In anticipation of the impending federal law, the governor submitted his proposal to the state legislature, which failed to gain legislative approval and presaged a political fight not unlike the fight over the state's role in Indian gaming.¹⁸⁹

After the Federal PRA became law, the New Mexico Legislature responded with the passage of its own Family Assistance and Individual Responsibility Act (FAIR) to accommodate TANF requirements and provide authorization to the New Mexico Human Services Department (HSD) to administer the program.¹⁹⁰ The governor vetoed the FAIR bill and item vetoed the funds for it in the General Appropriation Act. In his veto message, the governor stated that "he possessed authority to exercise the discretion left to the states under the [federal] PRA [arguing] that the proposed state legislation encroached upon the executive's authority."¹⁹¹ He then announced the creation of his own public assistance reform program labeled "PROGRESS," which HSD sought to implement through its regulatory process.¹⁹² The instant action was then brought seeking a writ of mandamus to enjoin the governor's program.¹⁹³

After briefing and oral argument by the parties, the court ruled from the bench against the governor's exercise of executive authority because it was an unconstitutional violation of separation of powers. The court ordered the respondents to:

- a) desist from the implementation of their PROGRESS program, and b) to administer the Public Assistance Program in full compliance with New Mexico statutes until such time as existing law is altered or amended by the passage of a bill by the state legislature which is then signed into law by the governor in accordance with the provisions of the New Mexico Constitution.¹⁹⁴

The governor and his HSD Secretary failed to follow that order. This led to a subsequent hearing that resulted in another order, which held the respondents in contempt. The issuance of the court's formal opinion

188. 42 U.S.C. §§ 601-609 (1997).

189. *State ex rel. Taylor*, 1998-NMSC-015 at ¶¶ 11-12, 125 N.M. at 347, 961 P.2d at 772.

190. *Id.* ¶ 10, 125 N.M. at 347, 961 P.2d at 772.

191. *Id.* ¶ 11, 125 N.M. at 347, 961 P.2d at 772.

192. *Id.* ¶ 12, 125 N.M. at 347, 961 P.2d at 772.

193. *Id.* ¶ 13, 125 N.M. at 347-48, 961 P.2d at 772-73.

194. *Id.* ¶ 13 125 N.M. at 348, 961 P.2d at 773.

followed. The opinion fully elaborated on the court's separation-of-powers reasoning underlying its initial ruling, as well as the basis of its contempt ruling.¹⁹⁵

After reviewing the propriety of the mandamus petition in this case,¹⁹⁶ the court dealt with the respondents' arguments, which maintained that:

[A]s agents of the executive branch, they may implement the policy changes [in the welfare program] without seeking the direct participation of the Legislature . . . [T]he Legislature conferred discretionary authority upon HSD to . . . enact all regulations necessary to secure federal public assistance funds [and] that New Mexico and federal law compelled them to make the policy changes.¹⁹⁷

The court repeated its discourse from the recent *Clark* decision on the importance of separation-of-powers to the structure of government, the non-absolute nature of the doctrine, and the need for the court to ensure "the proper balance between the executive and legislative branches."¹⁹⁸ The court went on to elaborate on the application of the *Clark* balancing test in the context of this case:

A violation [of the separation of powers] occurs when the Executive, rather than the Legislature, determines "how, when, and for what purpose the public funds shall be applied in carrying on the government . . ."¹⁹⁹ [I]nfringement upon legislative power may also occur where the executive does not "execute existing . . . statutory or case law [and rather attempts] to create new law."²⁰⁰

Applying the *Clark* principles here, the court concluded that "Respondents' program implement[ed] the type of substantive policy changes reserved to the Legislature [because] [t]heir changes substantially altered, modified, and extended existing law governing . . . public assistance in New Mexico,"²⁰¹ and attempted "to foreclose legislative action

195. See *id.* ¶¶ 14-66, 125 N.M. at 348-57, 961 P.2d at 773-82.

196. See *id.* ¶¶ 14-18, 125 N.M. at 348-49, 961 P.2d at 773-74. The court reiterated its earlier discussion of mandamus in the cases discussed earlier. See cases cited *supra* note 160.

197. *Taylor*, 1998-NMSC-015 at ¶ 19, 125 N.M. at 349, 961 P.2d at 774.

198. *Id.* ¶ 24, 125 N.M. at 350, 961 P.2d at 775 (quoting *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 34, 120 N.M. 562, 574, 904 P.2d 11, 23).

199. *Id.* (quoting *State ex rel. Schwartz v. Johnson*, 1995-NMSC-83, ¶ 14, 120 N.M. 820, 825, 907 P.2d 1001, 1006 (holding that a statute conferring fiscal authority on the governor did not provide sufficient standards to allow the governor to act contrary to existing legislative policy choices)).

200. *Id.* (quoting *Clark*, 1995-NMSC-048 at ¶ 34, 120 N.M. at 573, 904 P.2d at 22).

201. *Id.* ¶ 25, 125 N.M. at 350, 961 P.2d at 775.

... where legislative authority [wa]s undisputed.”²⁰² That led the court to expressly hold that “[r]espondents’ program constitute[d] executive creation of substantive law, and as such, [wa]s an unconstitutional encroachment upon the Legislature’s role of declaring public policy.”²⁰³

The court then bolstered its holding by listing numerous ways in which the executive plan would work substantive adjustments to public assistance policy.²⁰⁴ All of which, by their very nature, set fundamental standards and made vital policy choices—both roles reserved for the legislature under article IV, section 1 of the New Mexico Constitution.²⁰⁵ These adjustments were consistent with past practices involving public assistance changes, leading the court to reiterate its conclusion that “[b]y implementing their plan through HSD regulations rather than through the required legislative process, Respondents made these core policy choices themselves, thereby preventing the constitutionally required input of the people’s elected law-making representatives.”²⁰⁶

The court similarly rejected the governor’s claim that he was authorized by either state or federal law to act alone in creating his new public assistance program,²⁰⁷ leading to yet a third restatement of its holding:

Because the substantive public assistance policy changes promulgated in Respondents’ plan required legislative participation and because neither state statute nor federal law conferred discretionary authority upon Respondents to institute the policy changes, we conclude that Respondents violated Article III, Section 1 of the New Mexico Constitution.²⁰⁸

202. *Id.* (quoting *Clark*, 1995-NMSC-048 at ¶ 34, 120 N.M. at 573, 904 P.2d at 22).

203. *Id.* This holding continues the court’s practice of melding formalism (the focus on the “legislative” nature of the activity), with functionalism (the degree of encroachment on the function of the other branch), as the operational test for violation of separation of powers. *See supra* notes 15–17 and accompanying text.

204. The court explained that the executive plan would deny the legislature “any participation” in the following policy choices: the definition of “dependency” for public assistance benefits; setting mandatory work requirements that might exceed those required by federal law; determining whether entitlement to benefits are to be maintained; and the setting of durational limits. *See Taylor*, 1998-NMSC-015 at ¶¶ 27–30, 125 N.M. at 350–51, 961 P.2d at 775–76.

205. *Id.* ¶ 31, 125 N.M. at 351, 961 P.2d at 776.

206. *Id.* ¶ 33, 125 N.M. at 352, 961 P.2d at 777.

207. *Id.* ¶¶ 34–48, 125 N.M. at 352–54, 961 P.2d at 777–79.

208. *Id.* ¶ 49, 125 N.M. at 355, 961 P.2d at 781. The remainder of the opinion dealt with the need for and content of the court’s further order of indirect civil contempt, and what was required for the Respondents to be able to purge themselves of that contempt. *Id.* ¶¶ 50–65, 125 N.M. at 355–57, 961 P.2d at 780–82.

Thus, *Taylor* provided an opportunity to apply the clear principles established in *Clark*. Given the governor's brazen disregard of legislative prerogatives, the court may have purposefully used the case as an opportunity to reemphasize and elaborate at length on the executive's lack of authority to formulate policy without constitutional or legislative authority. The court did so by listing in detail the number of ways the governor's actions either interfered with or foreclosed the essential legislative role in setting state policy. The court thus left as broad a precedent on the matter as it could, while also asserting a broad federalism-based power of the state to exercise the full range of its power in programs involving cooperative federalism, so long as that authority is expressed through legislative processes. Finally, to rein in excessive executive power, the court highlighted its own power to insist on the sanctity of judicial orders as an important cornerstone of the rule of law. The warning to future governors on this subject could not have been clearer.

V. CONCLUSION

The doctrine of separation-of-powers was fraught with practical difficulties from the beginning. The hope of the Framers of the late eighteenth century might have been for a constructive tension usually resolved by a healthy dose of self-restraint on the part of the political branches when dealing with one another. Nonetheless, with the rise of political parties, at both the federal and state level, the seeds had been sewn to allow for what Professor Schlesinger much later described as "permanent guerrilla warfare," often requiring judicial intervention to resolve.²⁰⁹

Similarly, the item veto was initially seen as a "good government" addition to the constitutions of the states to help check against budgetary excesses and provide an orderly assistance to balance budgets. But that device, too—especially when expanded (as in New Mexico) to allow item veto of more than "items of appropriation"—necessarily leads to manipulative legislative and gubernatorial struggles over much more than dollar amounts. The New Mexico experience, however, has some salutary features that followed from the court's careful attempt to articulate neutral principles to guide the judicial evaluation of cases brought to resolve inter-branch item veto disputes.

The *Sego/Coll* principles—articulating the court's dual policing role to protect each branch from the damaging interventions of the other—do

209. See Schlesinger, *supra* note 24.

provide guideposts for both executive and legislative actors. Indeed, the author has personally observed Legislative Counsel Service staff being able to use those principles in advising the legislative drafting process, and one can assume that similar advisement takes place in the executive branch with respect to proposed gubernatorial vetoes. Difficulties, however, will remain when complex problems arise, like those presented in *Stewart* and *Cisneros*; the latter having created opportunities for future arguments to avoid the *Sego/ Coll* principles.

Furthermore, special circumstances are always presented when the courts are confronted with non-item veto, separation-of-powers cases where the executive tries to take preemptive action to assert executive authority and diminish or foreclose legislative authority in matters that require critical decisions concerning state policy. When matters like that arise, as they did in *Clark* and *Taylor*, state courts like ours will be ever vigilant to protect the essential legislative prerogatives and redress the proper balance between legislative and executive power.

Finally, another value comes from New Mexico's extensive judicial involvement in these matters. An experienced court with a well-developed separation of power and item veto jurisprudence, and extensive experience with such matters, can be trusted to delve deeply in these cases when necessary and also exercise restraint when advisable, not out of timidity, but from an understanding that on some occasions judicial inaction may be an effective tool in reaching accommodation.

APPENDIX A: TABLE OF STATE ITEM VETO PROVISIONS

State Constitution Line-Item Veto Provisions ²¹⁰	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Alabama (Ala. Const. § 126) (“disapprove any item or items of any appropriation bill embracing distinct items”)	X		
Alaska (Alaska Const. art. II, § 15) (“strike or reduce items in appropriation bills”) ²¹¹	X		X
Arizona (Ariz. Const. art. V, § 7) (“If any bill ... contains several items of appropriations of money, he may object to one or more of such items”)	X		
Arkansas (Ark. Const. art. VI, § 17) (“disapprove any item, or items, of any bill making appropriation of money, embracing distinct items”)	X		

210. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

211. In Alaska, line item vetoes overrides require an affirmative vote by three-quarters of the legislature, instead of only two-thirds for standard vetoes. *See* Alaska Const. art. II, § 15.

State Constitution Line-Item Veto Provisions ²¹²	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
California (Cal. Const. art. IV, § 10) (“reduce or eliminate one or more items of appropriation”)	X		X
Colorado (Colo. Const. art. IV, § 12) (“disapprove of any item or items of any bill making appropriations of money, embracing distinct items”)	X		
Connecticut (Conn. Const. art. IV, § 16) (“disapprove of any item or items of any bill making appropriations of money embracing distinct”)	X		
Delaware (Del. Const. art. III, § 18) (“disapprove of any item or items of any bill making appropriations of money, embracing distinct items”)	X		
Florida (Fla. Const. art. III, § 8) (“veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates”)	X		

212. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

State Constitution Line-Item Veto Provisions ²¹³	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Georgia (Ga. Const. art. III, § 5, ¶ XIII) (“approve any appropriation and veto any other appropriation in the same bill”)	X		
Idaho (Idaho Const. art. IV, § 11) (“disapprove of any item or items of any bill making appropriations of money embracing distinct items”)	X		
Illinois ²¹⁴ (Ill. Const. art. IV, § 9) (“reduce or veto any item of appropriations in a bill”)	X		X
Iowa (Iowa Const. art. III, § 16) (“disapprove any item of an appropriation bill”)	X		
Kansas (Kan. Const. art. II, § 14) (“If any bill ... contains several items of appropriation of money, one or more of such items may be disapproved”)	X		
Kentucky (Ky. Const. § 88) (“disapprove any part or parts of appropriation bills embracing distinct items”)		X	

213. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

214. If the governor reduces the amount of a line-item in Illinois, only a majority vote is required to override this reduction. Ill. Const. art. IV, § 9.

State Constitution Line-Item Veto Provisions ²¹⁵	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Louisiana (La. Const. Ann. art. IV, § 5) (“veto any line item in an appropriation bill”)	X		
Maine ²¹⁶ (Me. Const. art. IV, Pt. 3, § 2-A) (“disapprove any dollar amount appearing in an appropriation section or allocation section, or both, of an enacted legislative document . . . [and] replace the dollar amount with one that does not result in an increase in an appropriation or allocation or a decrease in a deappropriation or deallocation”)	X		X
Maryland (Md. Const. art. II, § 17) (“disapprove of any item or items of any Bills making appropriations of money embracing distinct items”)	X		
Massachusetts (Mass. Const. art. LXIII, § 5) (“disapprove or reduce items or parts of items in any bill appropriating money”)	X		X

215. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

216. The line-item veto in Maine can be overridden with a simple majority vote. Me. Const. art. IV, Pt. 3, § 2-A.

State Constitution Line-Item Veto Provisions ²¹⁷	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Michigan (Mich. Const. Art. 5, § 19) (“disapprove any distinct item or items appropriating moneys in any appropriation bill”)	X		
Minnesota (Minn. Const. art. IV, § 23) (“If a bill ... contains several items of appropriation of money, he may veto one or more of the items”)	X		
Mississippi (Miss. Const., § 73) (“veto parts of any appropriation bill”)	X		
Missouri ²¹⁸ (Mo. Const. art. IV, § 26) (“object to one or more items or portions of items of appropriation of money in any bill”)		X	X
Montana (Mont. Const. art. VI, § 10) (“may veto items in appropriation bills”)		X	

217. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

218. Appropriations for free public schools, or for the payment of principal and interest on the public debt are not subject to line-item veto in Missouri. Mo. Const. art. IV, § 26

State Constitution Line-Item Veto Provisions ²¹⁹	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Nebraska (Neb. Const. art. IV, § 15) (“may disapprove or reduce any item or items of appropriation”)	X		X
New Jersey (N.J. Const. art. V, § I, ¶ 15) (“may object in whole or in part to any such item or items” of appropriation)	X		
New Mexico (N.M. Const. art. IV, § 22) (“may . . . approve or disapprove any part or parts, item or items, of any bill appropriating money”)		X	
New York (N.Y. Const. art IV, § 7) (“may object to one or more of . . . items” in appropriation bills)		X	
North Dakota (N.D. Const. art. V, § 9) (“may veto items in an appropriation bill.”)		X	
Ohio (Ohio Const. art. II, § 16) (“may disapprove any item or items in any bill making an appropriation of money”)		X	

219. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

State Constitution Line-Item Veto Provisions ²²⁰	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Oklahoma (Okla. Const. art. VI, § 12) (may disapprove “any item” of any bill of appropriation.)		X	
Oregon (Or. Const. art. V, § 15a) (“power to veto single items in appropriation bills.”)		X	
Pennsylvania (Pa. Const. art. IV, § 16) (“power to disapprove of any item or items of any bill, making appropriations of money, embracing distinct items, and the part or parts of the <i>bill</i> approved shall be the law”)	X ²²¹		X ²²²
South Carolina (S.C. Const. art. IV, § 21) (may “approve any one or more of the items or sections contained in any bill appropriating money”)		X	

220. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

221. While Pennsylvania’s item veto provision allows the governor to veto “*any* item” of an appropriation bill, the vetoed item must—at minimum—include an appropriation. *Jubelirer v. Rendell*, 598 Pa. 16, 22, 953 A.2d 514 (2008).

222. Although Pennsylvania’s item veto provision does not explicitly allow the governor to reduce appropriation amounts, Pennsylvania’s highest court has found that the item veto provision allows the governor to “decrease” an appropriation amount in an appropriation bill. *Id.*, at 48.

State Constitution Line-Item Veto Provisions ²²³	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
South Dakota (S.D. Const. art. IV, § 4) (“may strike any items of any bill passed by the Legislature making appropriations”)		X	
Tennessee (Tenn. Const. art. III, § 18) (“may reduce or disapprove the sum of money appropriated by any one or more items or parts of items in any bill appropriating money”)	X		X
Texas (Tex. Const. art. IV, § 14) (“may object to one or more . . . items” of appropriation)	X		
Utah (Utah Const. art. VII, § 8) (“may disapprove any item of appropriation contained in any bill”)	X		
Virginia (Va. Const. art. V, § 6) (may “veto any particular item or items of an appropriation bill”)		X	

223. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

State Constitution Line-Item Veto Provisions²²⁴	Allows Veto to Appropriations in Appropriation Bills	Allows Veto of Non-Appropriations in Appropriation Bills	Allows Reducing or Changing Appropriations
Washington (Wash. Const. art. III, § 12) (“may object to one or more sections or appropriation items”)	X		
West Virginia (W. Va. Const. art. VI, § 51) (“may veto [an appropriation bill], or he may disapprove or reduce items or parts of items contained therein”)		X	X
Wisconsin (Wis. Const. art. V, § 10) (“Appropriation bills may be approved in whole or in part by the governor.”)		X	
Wyoming (Wyo. Const. art. IV, § 9) (may “disapprove of any item or items or part or parts of any [appropriation bill]”)		X	

224. The following states are not included in this chart, as they have no line-item veto provision: (1) Indiana; (2) Nevada; (3) New Hampshire; (4) North Carolina; (5) Rhode Island; and (6) Vermont.

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APPENDIX B: GENERAL APPROPRIATION ACT OF 2017

**HOUSE APPROPRIATIONS AND FINANCE COMMITTEE
SUBSTITUTE FOR HOUSE BILLS 2 AND 3**

**53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST
SESSION, 2017**

AN ACT

**MAKING GENERAL APPROPRIATIONS AND AUTHORIZING
EXPENDITURES BY STATE AGENCIES REQUIRED BY LAW.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF
NEW MEXICO:**

Section 1. SHORT TITLE.--This act may be cited as the "General
Appropriation Act of 2017".

Section 2. DEFINITIONS.--As used in the General Appropriation Act of
2017:

[The author has omitted Section 2's definitions.]

Section 3. GENERAL PROVISIONS.--

[The author has omitted Section 3's General Provisions.]

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Item	General Fund	Other State Funds	Intrnl Svc Funds/ Inter- Agency Trnsf	Federal Funds	Total Target
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Section 4. FISCAL YEAR 2018 APPROPRIATIONS.—

LEGISLATIVE

LEGISLATIVE

COUNCIL SERVICE:

Appropriations:	5,660.0				5,660.0
Subtotal	[5,660.0]				5,660.0

LEGISLATURE:

Appropriations:	1,386.0				1,386.0
Subtotal	[1,386.0]				1,386.0

LEGISLATIVE

FINANCE COMM.:

Appropriations:	4,220.3				4,220.3
Subtotal	[4,220.3]				4,220.3

SENATE CHIEF

CLERK:

Appropriations:	1,130.3				1,130.3
Subtotal	[1,130.3]				1,130.3

HOUSE CHIEF CLERK:

Appropriations:	1,097.7				1,097.7
Subtotal	[1,097.7]				1,097.7

LEGISLATIVE

EDUCATION STUDY

COMMITTEE

Appropriations:	1,233.4				1,233.4
Subtotal	[1,233.4]				1,233.4

LEGISLATIVE

COUNCIL SERVICE:

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LEGISLATIVE

BUILDING SERVICES:

Appropriations:	4,054.9	4,054.9
Subtotal	[4,054.9]	4,054.9

TOTAL LEGISLATIVE	18,782.6	18,782.6
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Mitchell Hamline Law Review

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